

NTSB Order No.
EM-48

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 10th day of December 1975.

O.W. SILER, Commandant, United States Coast Guard,

vs.

ALTON BOWIE JOYNER, Appellant

Docket ME-44

OPINION AND ORDER

Appellant is seeking review of the Commandant's decision affirming the suspension of his merchant mariner's document (No. Z-119809) for negligence while serving, under authority thereof, as a tankerman assigned to the tank barge OCEAN 80 during cargo transfer operations.¹

In the prior proceeding, appellant had appealed to the Commandant (Appeal No. 2020) from the initial decision of Administrative Law Judge Albert S. Frevola, rendered after a full evidentiary hearing.² Throughout these proceedings, appellant has been represented by his own counsel.

The law judge found that appellant, on October 25, 1972, was responsible for supervising the loading of the barge with fuel oil and gasoline at a marine terminal in the port of Cartaret, New Jersey; and that he left the barge unsupervised during such cargo transfer operations for a period in excess of 15 minutes . Although an absence in excess of 30 minutes was alleged, the law judge held the variance was of "no particular significance." He

¹The Commandant's action was taken pursuant to 46 U.S.C. 239(g). See 46 U.S.C. 391a(9)(B). This appeal therefrom is authorized by provisions of the Independent Safety Board Act of 1974 (49 U.S.C. 1903 (a) (9)(B)); and governed by rules of procedure set forth in 49 CFR 825. See 40 Fed. Reg. 30232, 30248-9, July 17, 1975.

²Copies of the decisions of the Commandant and the law judge are attached.

concluded that appellant was guilty of negligence in failing to give "his immediate attention to all aspects of the loading of these cargoes during the entire period of the loading, "as required

by the Coast Guard's tanker regulations in 46 CFR 35. It was established that the barge exploded during appellant's absence, but the law judge noted that it was neither alleged nor proved that appellant's negligence contributed to the casualty. He nonetheless classified the offense as "neglect of Duty causing damage to ship and cargo." Upon consulting the Coast Guard's scale of average order's for this type of seaman's offense,³ the law judge imposed a 3-month suspension on 12 months' probation.⁴

The Commandant repeated and, in minor respects, modified that factual findings of the law judge. He concluded that a prima facie case of negligence was made out against the appellant which was un rebutted, and thereupon affirmed the sanction.

In support of his appeal, appellant has filed a brief contending that there was a "material variation" between the findings of fact and the facts alleged as the basis of the negligence charge; that the findings are not supported by the evidence nor is the conclusion supported by the findings; and that an erroneous standard of conduct was applied.⁵ Counsel for the Commandant has not filed a reply brief.

Upon consideration of appellant's brief and the entire record, we have determined that the findings of fact and entered by the law judge, as modified by the Commandant, are supported by reliable, probative, and substantial evidence. We adopt those findings as our own and conclude therefrom that appellant's negligence was established. However, we further conclude that the law judge misclassified appellant's offense in view of his findings, requiring our reduction of the sanction heretofore imposed.

It is undisputed that the explosion took place shortly before 6:00 a.m. on the date in question; that it occurred during appellant's watch, which he began standing at midnight; and that he

³46 CFR 5.20-165.

⁴Under that order, appellant would be required to serve the suspension only if his commission of another seaman's offense during the probationary period should be proved pursuant to 46 U.S.C. 239(g).

⁵Appellant's further request for oral argument is denied. See section 825.25(b) of the Board's rules.

was solely responsible for supervising cargo transfer operations on the barge throughout the entire watch. The essential issues litigated were the length of time that he spent inside the dockhouse at the terminal located about 20 feet away from the barge, and whether in doing so he had neglected the prescribed duties of his watch. According to the dockman, who was the only witness called by the Coast Guard, the appellant sat at a desk in the dockhouse from "approximately 5:15 until the time of the explosion" (Tr. 26, 47-8).⁶ In rebuttal, appellant's counsel called a chief engineer of the tug DEFENDER, stationed nearby, who testified that appellant was "checking his tanks" on the barge at 5:30 (Tr. 68-9). Also presented was the transcript of a police officer's testimony in a prior proceeding to the effect that upon interrogating the dockman some 4 hours after the casualty, the latter told him that appellant had left the dockhouse to check the loading of the barge 10 to 15 minutes before the explosion, then came back and said that "everything was going along normally."⁷

In evaluating the conflicts of testimony, the law judge found no lack of credibility in the dockman but rather that he had candidly admitted on cross-examination that he did not remember what he told the police officer. The law judge accepted the officer's documented testimony and that of appellant's witness at the hearing as being more reliable than the dockman's to the extent that their testimony conflicted with his. The unrebuted portion of the dockman's testimony, that appellant entered the dockhouse at 5:30, left to make an inspection of the barge 10 or 15 minutes before the explosion, again returned to the dockhouse, and was there when the explosion occurred, was also accepted by the law judge. He thus found a period "clearly in excess of 15 minutes" remained when appellant was in the dockhouse.

In contending that the findings lack evidential support, appellant first argues that the law judge places him in the dockhouse at the very time he was observed on the deck of the barge by the engineer. This error has been corrected by the Commandant's finding that "at about 0530 [appellant] left the barge and proceeded to the dockhouse where he remained chatting with the dockman for approximately 15 minutes." The further argument that appellant's subsequent tour of inspection is "imprecisely timed as

⁶Thus there can be no claim of variance between the allegations and proof.

⁷Hearing of Marine Board of Investigation, Appellant's Exhibit A, pp. 1681-3. This was offered to show a prior inconsistent statement by the dockman. It was admitted into evidence by stipulation (Tr. 59, 80).

ten or fifteen minutes" is rejected, since this was solely due to the speculative nature of appellant's own evidence. The findings as modified are supported by the record in our view, and we have no reason, based on the arguments advanced by appellant, for disturbing them.

Moreover, we find that the law judge applied the proper regulatory standard in determining negligence herein. He found that appellant "was not in a position [from inside the dockhouse] to properly supervise the operations of the cargo system valves, to observe the cargo connections for leakage, and to observe the rate of loading for the purpose of avoiding the overflow of the tanks."⁸

Appellant's objection here is with respect to the concept of "constant supervision" evoked by the law judge and the Commandant in their interpretations of the regulatory standard. He argues that there are many matters which requires a tankerman to leave a barge during cargo transfer operations, such as "the necessity of phoning his company ..., contacting a terminal representative ..., responding to a call of nature..., [and] checking shoreside connections." He also asserts that it is common practice for a single tankerman to supervise the loading of several barges simultaneously.

The difficulty with these arguments is that they have no relevance to the case at hand. Appellant was supervising only one barge and was not performing any of the tasks described. The unrefuted evidence is that he was in the dockhouse simply "to relax and socialize" with the dockman, as found by the law judge. It suffices for us to hold that this activity was utterly incompatible with the regulatory standard, and that appellant neglected the duties of his watch while spending time in this manner.

Moreover, we agree with the Commandant's determination that there was no material variance between findings and allegations. This was made in accordance with a well settled precedent that "there may be no subsequent challenge of issues which are actually litigated [where]there has been actual notice and adequate opportunity to cure surprise."⁹ In addition, while claiming to have been misled, appellant makes no showing of prejudice to his

⁸These are duties prescribed for the senior deck officer during cargo transfer operations aboard tank barges in 46 CFR 35.35-35. Appellant's brief concedes that he had such duties as "the senior man on watch."

⁹Kuhn v. Civil Aeronautics Board, 183 F. 2d 839, 841 (D.C. Cir., 1950); Commandant v. Reagan, 1 N.T.S.B. 2193 (Order EM-9, 1970); 1 Davis, Administrative Law Treatise /z/ /z/ 8. 04, 8.06.

case by reason of the variance in question.¹⁰ Nonetheless, the length of time and the circumstances surrounding his absence from the barge affect the comparative seriousness of the offense.

Insofar as the circumstances are concerned, it appears that appellant performed one inspection on the barge immediately before and another during the aggregate time involved. This obvious mitigating factor was ignored by the law judge in assessing sanction. His assessment of the offense is also deficient in light of his prior finding that appellant's negligence did not contribute to the vessel casualty. For these reasons, in view of appellant's good prior record, and upon weighing the true gravity of his offense according to the findings herein, we believe that his offense should be classified as a failure to perform his duty, as listed in Group A of the Coast Guard's scale of average orders, warranting no more than an admonition for first offenders such as appellant.¹¹

ACCORDINGLY, IT IS ORDERED THAT:

1. The appeal be and it hereby is denied except insofar as modification of the Commandant's order is provided for herein; and

2. The order suspending appellant's documents for 3 months on 12 months' probation, affirmed by the Commandant, be and it hereby is modified to provide that an admonition be entered against the appellant for failure to perform duty.

REED, Chairman, McADAMS, THAYER, BURGESS, and HALELY, Members of the Board, concurred in the above opinion and order.

(SEAL)

¹⁰In fact, appellant's brief rejects the remedy of remand, although this is the most that he would be entitled to if such prejudice could be demonstrated.

¹¹See n. 3, supra.